Ajmain bin Abd Rahim v Nik Suhaidi bin Nik Othman & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-17D-7–02 OF 2017
AZIZAH NAWAWI J
29 AUGUST 2018

Legal Profession — Disciplinary board — Appeal against decision of disciplinary board — Disciplinary board ordered for applicant's name to be struck off from rolls of advocates and solicitors — Whether misconduct proven beyond reasonable doubt — Whether findings of Disciplinary Committee sustainable — Legal Profession Act 1976 s 103D

This was the applicant's appeal seeking the following prayers: (a) that the advocates and solicitors disciplinary board's ('the DB') decision made in pursuant to s 103D of the Legal Profession Act 1976 ('the LPA 1976') in allowing the respondents' complaint and ordered that the applicant's name be struck off the rolls of the advocates and solicitors ('the decision') be set aside; and (b) for an order that the second respondent ('the Bar Council') was to reinstate the applicant's name into the rolls of the advocates and solicitors. The first respondent ('the original complainant') had lodged a complaint ('the complaint') with the Bar Council. The gist of the complaint was that the legal firm of Messrs Abdul Aziz & Assoc ('the firm') had misapplied the client's money belonging to the original complainant amounting to RM143,851.13. Following the said complaint, the DB had issued a letter to Asmadi Faizal bin Ibrahim ('Asmadi'), a partner of the firm, demanding for an explanation from him. Asmadi then replied to the DB's letter. Subsequently, the original complainant replied to Asmadi's letter. Upon hearing the explanation and submission given by Asmadi, the DB made a decision to include the applicant and three others as the respondents to the complaint. The DB also formed a disciplinary committee ('the DC') to investigate into the complaint against, inter alia, Ajmain bin Abd Rahim ('the applicant'). At the end of the investigation, the DC made findings of which had been affirmed by the DB. The DB had ordered for the applicant's name to be struck off from the rolls of the advocates and solicitors. Being aggrieved by the said decision, the applicant had filed this originating summons to set aside the said decision. The core issue raised by the applicant was that his signature on the remittance form for the sum of RM75,837.67 ('exh R2W1D4') out of AmBank to Permodalan Kemajuan Negeri Selangor was forged, that he did not sign on exh R2W1D4. The applicant called Mr William Pang, who testified before the DC that based on his analysis of the signatures of the applicant, there were differences between the signature on exh R2W1D4, and the applicant's specimen signature given to him. The DC took the position that the applicant only challenged his signature

on exh R2W1D4, but had failed to challenge the signature on the other remittance form for the sum of RM65,000.

Held, allowing the application with no order as to costs:

(1) There was merit in the applicant's contention that the reason why he was only challenging his signature on exh R2W1D4 was because the admission to the misappropriation was only in respect to the RM76,000. Since the finding of misconduct centred around the admission to the misappropriation of RM76,000, it was therefore not unreasonable for the applicant to only challenge the remittance form for the sum of RM76,000 (see paras 18–19).

(2) There was nothing in the DC's 'report of investigation proceedings' where it was clearly stated by Mr William Pang that he could not say conclusively that the applicant's signatures had been forged. Therefore, the expert opinion of Mr William Pang supported the applicant's contention that he did not sign exh R2W1D4 (see paras 21–22).

(3) The expert report had created a doubt with regards to the applicant's signature on exh R2W1D4. As the DC's finding on the culpability of the applicant was based 'on the fact that he continued to be one of the signatories to the Ambank CA', since there was doubt with regards to his signature on exh R2W1D4, therefore the findings of the DC was not sustainable. Thus, the DB's reliance on the same was clearly misplaced (see para 23).

[Bahasa Malaysia summary

Ini adalah rayuan pemohon untuk memohon permohonan berikut: (a) bahawa keputusan lembaga tatatertib peguambela dan peguamcara ('LT') dibuat mengikut Akta Profesion Undang-undang 1976 ('LPA 1976') yang membenarkan aduan responden dan memerintahkan supaya nama pemohon dipotong daripada Daftarai Peguambela dan Peguamcara ('keputusan') diketepikan; dan (b) untuk perintah bahawa responden kedua ('Majlis Peguam') untuk mengembalikan nama pemohon ke dalam daftarai peguambela dan peguamcara. Responden pertama ('pengadu asal') telah membuat aduan ('aduan') dengan Majlis Peguam. Intipati aduan adalah bahawa firma guaman daripada Tetuan Abdul Aziz & Assoc ('firma') telah menyalahgunakan wang klien kepunyaan pengadu asal berjumlah RM143,851.13. Berikutan aduan tersebut, DB telah mengeluarkan surat kepada Asmadi Faizal bin Ibrahim ('Asmadi'), rakan kongsi firma itu, meminta penjelasan daripadanya. Asmadi kemudian menjawab surat DB. Seterusnya, pengadu asal menjawab surat Asmadi. Apabila mendengar penjelasan dan hujahan yang diberikan oleh Asmadi, LT membuat keputusan untuk memasukkan pemohon dan tiga orang lain sebagai responden terhadap aduan tersebut. LT juga menubuhkan jawatankuasa tatatertib ('JT') untuk menyiasat

A aduan terhadap, antara lain, Ajmain bin Abd Rahim ('pemohon'). Pada akhir siasatan, JT membuat penemuan yang telah disahkan oleh LT. LT telah mengarahkan supaya nama pemohon dipotong daripada daftarai peguambela dan peguamcara. Terkilan dengan keputusan tersebut, pemohon telah memfailkan saman pemula ini untuk mengetepikan keputusan tersebut. Isu
B utama yang dibangkitkan oleh pemohon ialah tandatangannya ke atas borang pengiriman wang sebanyak RM75,837.67 ('exh R2W1D4') daripada AmBank kepada Permodalan Kemajuan Negeri Selangor adalah dipalsukan, bahawa dia tidak menandatangani eksh R2W1D4. Pemohon memanggil En William Pang, yang memberi keterangan di hadapan JT yang berdasarkan analisisnya
C mengenai tandatangan pemohon, terdapat perbezaan di antara tandatangan pada eksh R2W1D4 dan tandatangan spesimen pemohon yang diberikan kepadanya. JT mengambil kedudukan bahawa pemohon hanya mencabar tandatangannya di eksh R2W1D4, tetapi gagal untuk mencabar tandatangan
D pada borang pengiriman wang lain sebanyak RM65,000.

Diputuskan, membenarkan permohonan tanpa perintah untuk kos:

(1) Terdapat merit dalam pertikaian pemohon bahawa sebab mengapa dia hanya mencabar tandatangannya pada eksh R2W1D4 kerana pengakuan
E terhadap penyelewengan hanya berkaitan dengan RM76,000. Memandangkan penemuan salah laku berpusat di sekitar pengakuan ke penyelewengan sebanyak RM76,000, oleh itu tidak munasabah bagi pemohon untuk mencabar borang pengiriman wang sebanyak
F RM76,000 (lihat perenggan 18–19).

(2) Tidak ada apa-apa dalam 'laporan prosiding penyiasatan' JT di mana ia telah dinyatakan dengan jelas oleh En William Pang bahawa dia tidak dapat mengatakan secara konsisten bahawa tandatangan pemohon telah dipalsukan. Oleh itu, pendapat pakar En William Pang menyokong
G pertikaian pemohon bahawa dia tidak menandatangani eksh R2W1D4 (lihat perenggan 21–22).

(3) Laporan pakar telah menimbulkan keraguan berkenaan dengan tandatangan pemohon pada eksh R2W1D4. Oleh kerana penemuan JT
H mengenai kesahihan pemohon itu berdasarkan 'pada fakta bahawa dia terus menjadi salah satu penandatangan kepada Ambank CA', oleh kerana ada keraguan berkenaan dengan tandatangannya pada eksh R2W1D4, oleh itu penemuan JT tidak dapat dikekalkan. Oleh itu,
I pergantungan DB pada perkara yang sama adalah jelas tidak kena (lihat perenggan 23).]

Notes

For cases on appeal against decision of disciplinary board, see 9 *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1543–1547.

Cases referred to

Keith Sellar v Lee Kwang; Tennakoon v Lee Kwang [1980] 2 MLJ 191, FC (refd)

Legislation referred to

Legal Profession Act 1976 s 103D

Adnan Seman (Adnan Sharida & Assoc) for the applicant.
Jeremy Khalif (Olivia Lee with him) (Nadzarin Kuok Puthucheary & Tan) for the second respondent.

Azizah Nawawi J:

APPLICATION

[1] This is the applicant's appeal seeking the following prayers:

(a) that the advocates & solicitors disciplinary board's ('DB') decision dated 13 January 2017 made in pursuance to s 103D of the Legal Profession Act 1976 ('the LPA 1976') in allowing the respondents' complaint and ordered that the applicant's name be struck off the rolls of the advocates & solicitors ('the decision') be set aside; and

(b) for an order that the second respondent ('Bar Council') is to reinstate the applicant's name into the rolls of the advocates & solicitors.

[2] Having considered the application and the submission of the parties, this court has allowed the application with no order as to costs.

THE SALIENT FACTS

[3] The applicant was enrolled as an advocate and solicitor of the High Court of Malaya on 17 May 2001.

[4] Vide a letter of complaint dated 10 July 2013, the first respondent ('the original complainant') had lodged a complaint ('the complaint') with the second respondent, the Bar Council. The gist of the complaint was that the legal firm of Messrs Abdul Aziz & Assoc ('the firm') had misapplied the client's money belonging to the original complainant amounting to RM143,851.13.

[5] Following the said complaint, the DB had issued a letter dated 2 September 2013 to Asmadi Faizal bin Ibrahim ('Asmadi'), a partner of the Firm, demanding for an explanation from him. Asmadi then replied to the DB's letter vide his letter dated 17 December 2013. Subsequently, the original complainant replied to Asmadi's letter vide a letter dated 21 January 2014.

[6] On 21 February 2014, upon hearing the explanation and submission given by Asmadi, the DB made a decision to include the applicant and three others as the respondents to the complaint. The DB also formed a disciplinary committee ('DC') to investigate into the complaint against the following persons:

(a) Asmadi Faizal bin Ibrahim of Messrs Abdul Aziz & Assoc;

(b) *Ajmain bin Abd Rahim* (previously practicing at Messrs Khairul A & Co);

(c) Nor Azril bin Roselan (previously practicing at Messrs Khairul A & Co);

(d) Abdul Aziz bin Muhammad Tahir (previously practicing at Messrs Abdul Aziz & Assoc); and

(e) Siti Asilati bt Basri of Messrs Abdul Aziz & Assoc;

[7] Nevertheless, on 26 May 2014, the original complainant decided to withdraw the complaint. Vide its letter dated 19 June 2014, the DB had informed the DC's chairman that the original complainant has the right to withdraw the complaint against all the respondents, including the applicant. However, since the Bar Council has already intervened and was a party to the said complaint, the DC is to proceed with the investigation.

[8] With regards to the applicant herein, at the end of the investigation, the DC made the following recommendation to the DB:

> 2. That R2 (*Ajmain*) was a Partner of the Firm and in the view of the DC, he continued to remain so even though he ostensibly withdrew from the Partnership of Messrs Abdul Aziz & Associates to join Messrs Khairul A & Co on 1.5.2011 by reason of the fact that he continued to be one of the signatories to the Ambank CA. therefore, he is culpable for:
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> (a) The conversion of original complainant's funds in the Ambank CA to pay PKNS; and
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> (b) For the conversion of PKNS fund received into Ambank CA.
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> ...
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> 6. Accordingly, the DC recommend to the DB as follows:
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> 1. ...
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> 2. R2 be struck off under Section 94(2) of the Legal Profession Act 1976 ...

[9] The findings of the DC have been affirmed by the DB, and on 13 January 2017 the DB had ordered for the applicant's name to be struck off from the rolls of the advocates and solicitors.

[10] Being aggrieved by the said decision, the applicant has filed this

originating summons to set aside the said decision.

THE FINDINGS OF THE COURT

[11] It is common ground that both the DC and the DB are required to apply the standard of proof, beyond reasonable doubt, in the disciplinary proceedings. In *Keith Sellar v Lee Kwang; Tennakoon v Lee Kwang* [1980] 2 MLJ 191, the Federal Court held as follows:

> The second question is what burden of proof did the Disciplinary Committee apply in arriving at its findings. Looking at the grounds given in its statement of findings, the Disciplinary Committee although it made very firm findings unfortunately did not say expressly what standard of proof it adopted in arriving at its decision.
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> First, what is the standard of proof required in such a proceeding? Very recently, this court in *Au Kong Weng v Bar Committee, Pahang* [1980] 2 MLJ 89 dealt with the same question and accepted the standard set by *Bhandari's case* [1956] 3 All ER 742. Lord Tucker in that case approved the required standard established by the Court of Appeal in that in every allegation of professional misconduct involving an element of deceit or moral turpitude a high standard of proof is called for. The Court of Appeal also expressed the view that any body of professional men sitting in judgment on a colleague should not be content to condemn on a mere balance of probabilities.
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> *The standard of proof required in a proceeding of this type is proof beyond reasonable doubt.* In the judgment of this court in *Au Kong Weng*'s case, the Chief Justice said:
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> > It is a *question for the committee to decide, first, whether the facts alleged in the charge had been proved beyond reasonable doubt and secondly whether the appellant in relation to those facts, was guilty of such conduct.* The absence in the Committee's determination of any mention of the standard of proof does not justify an inference that it had failed to have regard to it.

[12] It is the submission of the Bar Council that based on the contemporaneous documents, the following facts are not in dispute:

(a) vide a letter dated 1 July 2013 issued by the firm, admitting that the firm had decided to appropriate the original complainant's monies and apply it towards discharging the firm's debt to PKNS;

(b) that the original complainant's money was taken out from the firm's client account No 023-202-200112-0 maintained at AmBank's Medan Pasar Branch, Kuala Lumpur;

(c) that up to 26 May 2014, the sole signatories to the firm's client account are the applicant and one Nor Azril bin Roslan ('Azril'), with the condition that both are to sign; and

(d) hence, both the applicant and Azril had signed the remittance form. These signatures have been verified and there was a verbal confirmation

by one Rosnani and one JC, from the bank, at 11.25am on 18 June 2013. However, both Rosnani and/or JC did not attend the DC proceedings as witnesses.

[13] Therefore, based on the contemporaneous documents and the undisputed facts, it is the submission of the Bar Council that the applicant was involved in the misappropriation of the original complainant's monies in the firm's client account.

[14] However, it is the applicant's submission that the DC has failed to appreciate that the facts alleged in the misconduct had not been proven beyond reasonable doubt and that the applicant was not guilty of such misconduct.

[15] The core issue raised by the applicant is that his signature on the remittance form for the sum of RM75,837.67 (exh R2W1D4) out of AmBank to Permodalan Kemajuan Negeri Selangor ('PKNS') was forged, that he did not sign on exh R2W1D4. To support his contention, the applicant called Mr William Pang, who testified before the DC that based on his analysis of the signatures of the applicant, there are differences between the signature on the application remittance form, exh R2W1D4, and the applicant's specimen signature given to him.

[16] However, the DC took the position that the applicant only challenged his signature on exh R2W1D4, but had failed to challenge the signature on the other remittance form for the sum of RM65,000. Added to that, the DC also finds that 'the comparison of their signatures on both forms show beyond doubt that they are the same. Additionally, they did not challenge their signatures drawn on the AmBank CA withdrawing funds from AmBank CA after 1.5.2011'.

[17] But, the DC failed to consider that in the letter issued by the firm dated 1 July 2013 to the original complainant, the firm had only admitted to the use of the sum of RM76,000 of the original complainant's money. The said letter reads:

> ...
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> Oleh itu, demi untuk mengurangkan masalah semua pihak dan Pemilik Tetuan Abdul Aziz & Associates dan Pihak Akaun Clients' AmIslamic Bank sendiri iaitu En Nor Azril bin Roselan, maka kami telah membuat keputusan untuk 'meminjam' sebahagian dari jumlah wang baki pembelian rumah/balance purchase price iaitu berjumlah *RM76,000.00* untuk melangsaikan hutang dengan PKNS. Hutang PKNS itu adalah merupakan hutang En Nor Azril
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> ...

[18] Therefore, I am of the considered opinion that there is merit in the applicant's contention that the reason why he is only challenging his signature on exh R2W1D4 is because the admission to the misappropriation is only in respect to the RM76,000. Indeed, the DC has decided on the issue of culpability based on the form's admission to the misappropriation of RM76,000. Added to that, it is also the Bar Council's submission that the undisputed fact is that vide a letter dated 1 July 2013 issued by the firm, the firm had decided to appropriate the original complainant's monies and apply it towards discharging the firm's debt to PKNS.

[19] As such, since the finding of misconduct centred around the admission to the misappropriation of RM76,000, it is therefore not unreasonable for the applicant to only challenge the remittance form for the sum of RM76,000.

[20] With regards to the evidence of the expert, Mr William Pang, the DC made the following findings:

> The DC's view is as follows:
>
> 1. Needless to say the strongest point which R2 & R3 have in their favour is the evidence of the expert to the effect that in the expert's opinion, there are differences in the respective signatures of R2 and R3 as shown in their respective specimen as compared to the signatures which appear on the bank remittance form (Appendix A).
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> However, the DC is mindful as stated earlier that in all fairness to the expert as readily admitted by him, his evidence is at best an opinion. He cannot say conclusively that R2 and R3's signatures have been forged.

[21] There is nothing in the DC's 'report of investigation proceedings' where it is clearly stated by the witness, Mr William Pang that he cannot say conclusively that the applicant's signatures had been forged. What is before the court is the DC's summary of Mr William Pang's evidence, not his oral testimony. And also before this court is the expert report prepared by Mr William Pang, where he has made the following conclusion:

> CONCLUSION
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> Based on the abovementioned observations and considerations, I am of the following opinion:
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> > There is very strong support for the proposition that the *writer of the AJMAIN ABD RAHIM signatures on the specimen document referred to in items S1 to S5 and SB-1 did not write the AJMAIN ABD RAHIM on the questioned document referred to in item Q1* compared to the support for the alternative proposition that another writer the questioned signature. (Emphasis added.)

[22] Therefore, I am of the considered opinion that the expert opinion of

Mr William Pang supports the applicant's contention that he did not sign the remittance form, exh R2W1D4.

[23] Bearing in mind that the standard of proof required is beyond reasonable doubt, I find that the expert report has created a doubt with regards to the applicant's signature on exh R2W1D4. As the DC's finding on the culpability of the applicant is based 'on the fact that he continued to be one of the signatories to the Ambank CA', since there is doubt with regards to his signature on exh R2W1D4, therefore the findings of the DC is not sustainable. Thus, the DB's reliance on the same is clearly misplaced. In the premise, the application is allowed with no order as to costs.

Application allowed with no order as to costs.

Reported by Nabilah Syahida Abdullah Salleh